

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.294 OF 1989

The State of Maharashtra)
(At the instance of)
Shri B.S.Risbood,)
Assistant Collector, Centra)
Excise and Customs(Preventive))
Head Quarter, Pune.) ...Appellant

Versus

1. Parasmal Punamchand Jain)
alias Shah, Age:34 years,)
Occupation: Nil,)
Residing at 321, Flat No.11))
Jatan Niwas, Nana Peth,)
Pune.)
2. Bhadresh @ Bakul Mafatlal)
Shah, Age: 21 years,)
Residing at 407, Kasba Peth))
Pune.)
3. Chhaganlal Malagai Rawal)
alias Madrasi, Age:32 years))
Residing at 308, Triveni)
Apartment, 3rd Floor,)
Lower Parel Road, Bombay.) ...Respondents

Shri D.A.Nalawade for the Appellant.

Shri R.A. Shaikh for the Respondent No.1.

Shri S.G. Surana for the Respondent No.2.

CORAM : A.S. OKA, J.

DATE : SEPTEMBER 07/08, 2006.

ORAL JUDGMENT:

1. The submissions of the learned Counsel appearing
for the parties were heard on 05th September, 2006 and

today the Appeal is kept for dictation of judgment. The Appellant-State of Maharashtra has impugned the Judgment and Order dated 04th November, 1988 passed by the learned Chief Judicial Magistrate, Pune by which the Respondents were acquitted of offences punishable under section 135(1)(b)(i) of the Customs Act, 1962 and under section 85(1)(a) of the Gold (Control) Act, 1968. With a view to appreciate the submissions made by the learned counsel appearing for the parties, it will be necessary to refer to the prosecution case.

2. The complaint was filed by the Assistant Collector, Central Excise and Customs. The Respondents herein are the accused persons. On the basis of information that the second Respondent had gone to Bombay to bring the foreign marked gold, the Inspector, Central Excise (Preventive) Head Quarters, Pune maintained surveillance and a close watch around the residential premises of the first and second Respondent on 20th August, 1986 at 10.00 p.m. onwards. At about 01.30 a.m. on 21st August, 1986 the second Respondent was intercepted by the custom officials while approaching his residence at Kasba Peth, Pune. On being questioned the second Respondent admitted that he had brought 10 gold biscuits from Bombay and had delivered the same to the first Respondent who was residing at Nana Peth, Pune. The officers alongwith

the second Respondent immediately rushed to the residential premises of the first Respondent. At about 02.00 p.m. they reached residential premises of the first Respondent at Nana Peth and the said residential premises were searched in presence of two independent panch witnesses. It is alleged that in the said search 10 foreign marked gold biscuits weighing 70 tolas each having value of Rs.02,40,000/- and Indian Currency worth Rs.22,991/- was recovered. It is alleged that in the personal search of the second Respondent three Asiad bus tickets and certain amount was recovered.

3. According to the case of the prosecution, the first Respondent was engaged in purchasing the contraband gold biscuits from the third Respondent and was selling the same to various parties in Pune and Ahmednagar for a period of about six months prior to the search. According to the prosecution case, the second Respondent was an employee of the first Respondent. The first Respondent used to depute the second Respondent to Bombay to contact the third Respondent for receiving from him the contraband gold biscuits. The second Respondent used to collect the gold biscuits from the third Respondent and bring it to Pune and used to deliver the same to the first Respondent for further sale. The second Respondent used to travel up to Bombay either by train or by bus.

According to the prosecution case, on 20th August, 1986 as per the instructions of the first Respondent, the second Respondent left Pune for Bombay by an Asiad State Transport Bus at about 02.00 p.m. and reached Dadar approximately at 07.00 p.m. After reaching Dadar, through public telephone he spoke to third Respondent by calling him on telephone No.3798695 and asked him to deliver him 10 gold biscuits. The first Respondent had also informed the third Respondent by dialling the same telephone number that the second Respondent will be reaching Bombay to take delivery of gold biscuits. At about 08.00 p.m. on the same day, the third Respondent brought 10 foreign marked gold biscuits wrapped in a paper and delivered the same to the second Respondent at Dadar. The second Respondent alongwith the said gold biscuits travelled back to Pune by an asiad bus and reached Pune at about 01.00 a.m. on 21st August, 1986. By hiring an auto-rickshaw he reached the residence of the first Respondent and delivered the 10 gold biscuits to the first Respondent at about 01.15 a.m. Thereafter, he proceeded towards his own residence when he was intercepted by the customs officials. According to the prosecution case, statements of the Respondents were recorded under section 108 of the Customs Act in which all of them admitted to have committed the offence. The prosecution relied upon report of the General Manager

of Government of India Mint at Bombay for establishing
that the gold was of foreign origin.

4. Shri Nalawade, the learned Special Public
Prosecutor appearing for the Appellant has taken me
through the evidence. He submitted that the
incriminating statements of the Respondents under
section 108 of the Customs Act were admissible in
evidence and authenticity of the said statements was
proved by the prosecution. He submitted that the
conviction could have based on the said statements as
said statements corroborate the evidence of the
prosecution witnesses examined before the Trial Court.
He submitted that out of the 10 identical gold biscuits
which were seized from the residence of the first
Respondent, one sample was sent to the Government of
India Mint and it was not at all necessary to send all
the 10 gold biscuits to the Mint. He submitted that
there was enough evidence on record to show that one
sample out of the 10 biscuits which were seized was
sent to the Government of India Mint. He submitted
that the sanction for the prosecution and the
authorisation for prosecution were duly proved by the
prosecution. He submitted that the learned Chief
Judicial Magistrate committed an error by holding that
there was no material placed before Shri Ghorpade,
Inspector for forming a reasonable belief as required

by section 105 of the Customs Act which is the condition precedent for issuance of search warrant. He submitted that evidence on record shows that the search warrant was very much issued on 20th August, 1986 itself. He submitted that though the panch witnesses may not have supported the prosecution, the seizure panchnama was proved by other witnesses. He submitted that there was no reason for discarding the statements under section 108 of the Customs Act. He submitted that the learned Trial Judge was impressed by discrepancies in evidence which are totally insignificant. He submitted that if the evidence is considered as a whole, the only conclusion which could have been reached was of guilt of the Respondents.

5. Shri Shaikh appearing for the first Respondent

pointed out that the so called statements under section 108 of the Customs Act cannot be said to be legal and valid statements recorded under section 108 of the Customs Act as summons was not served to the first Respondent. He submitted that the learned Trial Judge rightly held that the prosecution has failed to establish the guilt of the Respondents. Shri Surana appearing for the second Respondent pointed out that the charge was in respect of all 10 gold biscuits and even according to the prosecution case, only one was sent to the Government of India Mint for verification.

He submitted that the basic evidence to show that the ten gold biscuits were foreign marked or foreign made was not adduced by the prosecution and therefore, the Trial Court has rightly passed an order of acquittal.

6. I have carefully considered the submissions.

Section 135 of the Customs Act reads thus:

"135. Evasion of duty or prohibitions.-[(1)]

Without prejudice to any action it may be taken

under this Act, if any person-

(a) is in relation to any goods in any way knowingly concerned [in misdeclaration of value or] in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any prohibition for the time being imposed under this Act or any other law for the time being in force with respect to such goods, or

(b) acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe

are liable to confiscation under
[section 111 or section 113, as the case
may be, or],

(c) attempts to export any goods which he
knows or has reason to believe are
liable to confiscation under section
113,]

shall be punishable,-

(i) in the case of an offence relating to
any of the goods to which section 123
applies and the market price whereof
exceeds one lakh of rupees, with
imprisonment for a term which may extend
to [seven years] and with fine:

. Provided that in the absence of
special and adequate reasons to the
contrary to be recorded in the judgment
of the court, such imprisonment shall not
be for less than [three years]

Section 85(1)(a) of the Gold Control Act, 1968 reads
thus:

"85. Punishment for illegal possession etc.,

of gold-[(1)] Whoever, in contravention of the provisions of this Act or any rule or order made thereunder-

(a) if the offence is under clause (i), (ii), (iv) or (viii) the offence under clause (viii) being a contravention of sub-section (3) of section 55] and the value of the gold involved therein exceeds one lakh of rupees, with imprisonment for a term which may extend to seven years and with fine:

. Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court such imprisonment shall not be for a term of less than six months;"

7. By notification dated 25th August, 1948 the Government of India has prohibited the importation of the gold. The notification is deemed to have been issued under section 11 of the Customs Act and therefore, the foreign marked gold biscuits were liable for confiscation under section 111(d) of the Customs Act. Thus, the prosecution will have to prove that the Respondents acquired possession of or were in any way

concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with the goods i.e. gold biscuits which they knew or had reason to believe are liable to confiscation under section 111 of the said Act. According to the case of the prosecution, section 123 of the Customs Act applies to gold biscuits and the price thereof exceeded Rs.01,00,000/-.

8. In the light of the legal provisions, the evidence led by the prosecution will have to be appreciated. P.W.1 is Shri Sudhakar Dattatraya Ghorpade who at the relevant time was working as an Inspector, Preventive (Head Quarters). He deposed that he received an information at about 05.00 p.m. on 20th August, 1986 that the second Respondent had gone to Bombay for bringing foreign marked gold biscuits 10 in number for the first Respondent. He stated that he alongwith other officers kept vigil near the house of the second Respondent at Kasba Peth, Pune. He stated that he was accompanied by Shri Tathavade, Superintendent and Inspectors Shri Ayyer, Shri Dalvi, Ms Savant and others. He narrated as to how the second Respondent was intercepted when he was on the way to his house. He stated that the second Respondent informed him that on instructions of his employer (first Respondent) he had gone to Bombay and contacted

one Madrasi on phone who handed over the goods in question at Dadar and he handed over the same to the first Respondent. P.W.1 Shri Ghorpade stated that after the said information was disclosed by the second Respondent they went to the residence of the first Respondent alongwith the second Respondent. The premises of the first Respondent was in a building known as "Jatan Niwas" bearing Flat No.11 on the second floor situated at Nana Peth, Pune. It is stated that in the meanwhile, the officials called two panchas and thereafter search was taken of the person of the second Respondent. It was found that he was possessing three tickets each of Rs.30/- of Asiad bus and 42 currency notes of Rs.10/- each. He stated that after seizure of the said articles from the second Respondent, the raiding party knocked the door of the house of the first Respondent. The first Respondent opened the door. Meanwhile, a search warrant was brought signed by Shri V.K.Garg, Assistant Collector. The said search warrant was shown by the panch witnesses to the first Respondent who disclosed his name. P.W.1 Shri Ghorpade described the manner in which search was carried out. He stated that when the first Respondent was asked to produce the foreign marked gold biscuits, he denied that he was in possession of the said biscuits. According to P.W.1 Shri Ghorpade, in a small passage near the bath room unused articles were lying. In the

said articles, the raiding party found red colour cloth bag containing 10 biscuits of gold having foreign marks at "Bank Leu Zurich 10 Tolas 0.999" wrapped in a piece of paper. He stated that in the search of iron cupboard in another room, a cash of different denominations amounting to Rs.22,991/- was found. The gold biscuits and the Indian currency notes were seized and a panchnama was recorded. The panch witnesses signed on all the gold biscuits which were kept in small cardboard box. It was sealed with paper seal. The currency notes were wrapped in a brown paper. According to the witness the first Respondent and he himself signed on the cardboard box and the currency notes packet. The panchnama was taken to the office and a copy of panchnama was given to the first Respondent. P.W.1 Shri Ghorpade was extensively cross-examined on the behalf of the Respondents. According to P.W.1 Inspector Ayyer had first seen golden biscuits in the bag and the said Inspector Shri Ayyer who brought the gold biscuits to him. Several questions were asked to P.W.1 by the Advocates appearing for the Respondent. P.W.1 Shri Ghorpade admitted that he had not recorded statement of the second Respondent prior to the panchnama. P.W.1 Shri Ghorpade was extensively cross-examined on the statements under section 108 of the Customs Act.

9. P.W.2 is one Ranjit Chunilal Kavediya. He stated that he was working as approved Assayor of the Central Excise Department. He stated that he was called by the Superintendent of Central Excise in his office at Tilak Road, Pune on 7th September, 1986. He was told to draw assay panchnama in respect of gold biscuits. He was shown the seizure panchnama of seizure of gold biscuits. He stated that the articles seized were kept under a seal and the seal was intact. According to him, he broke open the seal and took out all gold chips. He tested the gold biscuits on a test stone and weighed the same. According to him the purity of gold was 24 karat and each gold chip was weighing 116.650 ml.gm. He stated that the value of the gold chips on the relevant date was Rs.02,50,000/-. He stated that one representative sample of the gold biscuits was taken for sending it to the Mint and after assay panchnama, 9 gold chips were sealed. He identified packets in which 9 gold chips were kept. In cross-examination most of the questions were as regards experience of the said witness. He admitted that the panch witnesses to the seizure panchnama were not present at the time of assay panchnama. He stated that the sample in question was compared with the sample percentage of 99.50 and thereby purity of gold was ascertained.

10. P.W.3 is Shri Ramchandra Tathawade. He described the information received and the manner in which he informed his officers to keep watch at the premises of the first and second Respondents. He stated that he received phone message that officers had apprehended the second Respondent and the second Respondent had told the officers that the articles were handed over to the first Respondent. He stated that search of the second Respondent was taken in his presence. He stated that 10 chips of gold were recovered from one red colour cloth bag. He stated that on 21st August, 1986 he recorded statements of the panch witnesses. Then he described the manner in which statements under section 108 of Customs Act were recorded. He has also referred to summons issued to the accused persons under section 108 of the Customs Act. In the cross-examination he stated that he was not aware whether the flat held by the first Respondent was belonging to father-in-law of the first Respondent Shri Baldota.

11. About the alleged statements under section 108 of the Customs Act, the said witness was extensively cross-examined. He admitted that no summons was served to the second Respondent as required under section 108 of the Customs Act.

12. P.W.4 is one Shri Shripad Vyankathesh Khadilkar.

He stated that he was working for a period of 22 years in Government of India Mint as a Deputy Chief Assayer. His duties included analysis of gold, silver and platinum metals and coinage alloyment. He stated that gold samples are received by bullion keeper who gives DM number to the samples and cuts a piece and wraps it in muster paper after giving muster number. Muster paper alongwith sample is received by him in sealed condition. He used fire assay method for analysis of gold which is accepted by the Indian Standard Institute. He proved report dated 24th October, 1986 in evidence. The said witness was also extensively cross-examined by the Advocates appearing for the Respondents. So far as report at Exhibit 87 is concerned, it records that the sample was of gold which was of foreign origin and no dealer, refiner etc. in India was known to manufacture gold of this purity.

13. P.W.5 Bharat Digambar Kholam is goldsmith. He

stated that on 21st August, 1986 at about 01.30 a.m. to 01.45 a.m. he was directly taken near a house. He stated that he was not shown search authorisation. He was cross-examined by Advocates appearing for the Respondents.

14. P.W.6 is Shri Dattatray Ganpat Kaldhoke.

According to him he did not remember whether he was called by Excise Officer on 21st August, 1986. He stated that he was called by the officer to their Department on the next day. He stated that he did not go for search at the instance of Excise Officers on 21st August, 1986. He, however, admitted to have signed the panchnama. He stated that his signatures were obtained in the office of the department. Therefore, the witness was declared as hostile and the prosecutor was permitted to ask questions to the said witness in the nature of cross-examination. The said witness was examined probably to prove the panchnama recorded at the time of seizure.

15. P.W.7 Govind Modak who was working as Divisional Engineer, Telephones, Byculla, Bombay was examined as regards telephone numbers 379865 and 395850. He gave the names of the persons holding the said telephone connections. He stated that the telephone connection 379865 was not being used by its owner and the same was being used by the Accused No.3. He stated that the other telephone was not being used by anyone. His evidence is relevant as according to the case of the prosecution on 21st August, 1986 the first and second Respondents had contacted the third Respondent on one of the two numbers.

16. P.W.8 Shri Prakash Khade was serving as a Traffic Inspector in the State Transport Corporation. He was examined to prove the three Asiad bus tickets which were allegedly found in possession of the second Respondent. He identified the three tickets which were seized from the second Respondent. His evidence was led to prove that the three tickets were issued to the said Respondent. P.W.9 is one Vilas Kodgule. He is also one of the panch witnesses. He stated that there was a search at More Niwas, Deccan Gymkhana, Pune in which a calculator, one bundle of Rs.1000/- currency notes and one diary was found during search. He has not fully supported the prosecution.

17. P.W.10 is one Shri Vishwanath P. Yadav. He described that he was given two search warrants; one for the search of the residential premises of the first Respondent at Pune and the second was for search of his office situated at Deccan Gymkhana, Pune. He stated that the statement of the third Respondent recorded at Exhibit 77 was scribed by him. P.W.11 is Shri Dilip Vinayak Joshi who was working in the year 1986 in the Central Excise and Customs in Marine, Preventive. He searched the premises of the third Respondent.

18. P.W.12 is one Shri Premnath Nikhare. His evidence is as regards telephone connection number

395850. Nothing really turns on the said evidence.
P.W.13 Milind Jadhav was working as issue clerk in the State Transport Corporation who issued the ticket blocks to the conductor of the Asiad bus. The same contained the three tickets which were allegedly used by the second Respondent for travelling from Pune to Dadar and back to Pune. P.W.14 Bawatis Dabare was working as a conductor in an Asiad Bus. He also admitted to have issued the three tickets to a passenger on the same day.

19. P.W.15 Prabhakaran P.K. was at the relevant time holding the post of Inspector, Central Excise, Preventive, Head Quarters, Pune. On 18th September, 1986 he was called by Superintendent Tathavade and was asked to carry a sample in a sealed packet from Pune to Mumbai. He handed over the same to D.D.IIavia, the bullion keeper in government mint at Mumbai.

20. P.W.16 is Shri Balsubramanyam Ayyer. His evidence has a significance as P.W.1 has stated that Inspector Shri Ayer was the first person to see the gold biscuits. He has deposed about raid on the premises of the first Respondent. He stated that after entering the house of the first Respondent, Shri Tathavade allotted the specific areas to the members of the raiding party. He was asked to search the area

near bathroom. According to him adjacent to the bathroom there was a small passage in which unused articles were lying. He found one bag of red colour which contained old newspaper. He described that a paper packet which was unusually heavy was found deep inside the bag. He stated that the paper parcel was opened in presence of his superior, other officers and panch witness etc. and 10 gold biscuits of foreign markings were revealed. As in case of other witnesses he was also extensively cross-examined by the Advocates appearing for the accused persons. In cross-examination he admitted that initially the raiding party did not take search of the second Respondent. He stated that the house searched consisted of two rooms. He stated that he was not aware about the name of the officer who took search of the kitchen area.

21. The next witness is P.W.17 Ramvilas who was working as Inspector, Central Excise since 1974. At the relevant time he was working as Inspector Legal at Collectorate Head Quarters at Pune. His duty was of processing of case file for launching prosecution, putting papers to Superiors, drafting sanctions and attending courts etc. He described that draft sanction under section 137 of the Customs Act was drafted by him and he also drafted authorisation for prosecution under

section 97 of the Gold Control Act. He stated that authorisation for prosecution was at Exhibit 143 and sanction for prosecution was at Exhibit 144. The authorisation and sanction were proved in his evidence.

22. P.W.18 Moharadali Khubdar was working at the relevant time as a Junior Telecom Officer. He stated that he has submitted report to the Superior Officer by actually visiting Municipal House No.68/74, Shukla Estate, Mumbai. P.W.19 is Virendrakumar Garg who was serving as Assistant Collector Preventive Head Quarters, Pune. He stated that he was sitting in the office and left his office after issuing search warrant.

23. At this stage reference will have to be made to the statements under section 108 of the Customs Act of the accused persons which are relied upon by the prosecution. The first statement is at Exhibit 73 of the first Respondent which is allegedly recorded in presence of Shri Tathavade on 21st August, 1986. There is nothing on record to show that a summons as required by sub-section (1) of section 108 of the Customs Act was served before recording the said statement. The second statement of the first Respondent is at Exhibit 74 which was recorded on the same day in presence of Shri Tathavade. There is nothing on record to show

that a separate summons was issued to the first Respondent. Exhibit 75 is the statement of the second Respondent dated 21st August, 1986. Exhibit 76 appears to be summons issued on 21st August, 1986 to the first Respondent calling upon him to attend on 22nd August, 1986. On 22nd August, 1986 there is a statement of the third Respondent recorded which is at Exhibit 77. Below the statement, there appears to be a statement of the first Respondent. Below the statement of the first Respondent, there is a statement signed by the second Respondent. The date mentioned below the alleged signature of the second Respondent appears to be 22nd August, 1986. At Exhibit 78 there is a summons dated 22nd August, 1986 which was issued to the third Respondent calling upon him to attend on 23rd August, 1986. There is a summons at Exhibit 80 dated 23rd August, 1986 issued to the first Respondent calling upon the first Respondent to produce telephone bills for last six years for telephone No.55159. There is a statement at Exhibit 81 of the first Respondent allegedly recorded on 26th August, 1986. There is one more summons at Exhibit 82 dated 25th August, 1986. The said summons was issued calling upon the first Respondent to produce evidence, if any, regarding legal import of the goods seized from his office on 21st March, 1986. On the basis of the said summons there is a statement at Exhibit 83 allegedly signed by the first

Respondent.

23. Turning to the evidence of P.W.2 Ranjit Kavedya

it must be noted here that according to him he was shown seizure panchnama of the seizure of gold chips and he was shown the properties seized under the said seizure panchnama with seals intact. He stated that the panch witnesses to the seizure panchnama were not present at that time. He broke open the seals of all gold chips and tested the gold chips on test stone and weighed the same. He has described the purity of gold and weight of every chip. He has stated that there were foreign marking on the gold chip. He has, however, not stated that the foreign markings on all chips/biscuits were identical. He stated that one gold chip out of the 10 was taken as a representative sample and after assay panchnama 9 gold chips were sealed. A letter at Exhibit 87 dated 18th December, 1986 sent to the Government of India, Mint discloses that only one sample of gold chips was sent. The report at Exhibit 89 obviously relates to only one sample piece which was allegedly sent to the Government of India Mint. Thus, opinion of the experts in the Mint that the gold was of foreign origin and no one in India was known to manufacture gold of this purity obviously relates to only one sample which was forwarded to the Mint. There is no opinion of the experts from the Mint obtained as

regards 9 other chips assuming that the chip which was sent to the mint was seized in the house of the first Respondent. The offence under section 135 will be established only if it is proved that the goods are liable to confiscation under section 111 or section 113. Assuming that there was seizure of 10 gold biscuits at the residence of the first Respondent it is obvious that at least 9 of the gold biscuits were not proved to be covered by section 111 as it was not established on opinion of experts in the mint that the said biscuits were of foreign origin or were having foreign marking.

24. P.W.2 Ranjit Kavediya has not stated that he has identified the signatures of the attesting witnesses on seizure panchnama. He stated that he broke open the seal and one chip was sent to the Mint. It will be necessary to refer to the finding recorded by the learned Trial Judge. The learned Judge has held that the panchnama has not been legally proved. The learned Judge has referred to the evidence of panch witnesses. The learned Judge has rightly observed that both the panchas have not supported the prosecution in the sense that the contents of panchnama are not proved in the deposition of both the witnesses. The panchnama at Exhibit 97 is a crucial piece of evidence in the sense that the P.W.2 was made to read the panchnama and on

the basis of the said panchnama he has proceeded on the footing that the gold biscuits which were produced before him were seized from the residential accommodation of the first Respondent. It will be necessary to go back to evidence of P.W.1 Sudhakar Ghorpade. He has stated that on the spot main points of happenings of personal search were noted by the some of the Inspectors and the panchnama was not written on the spot where the search of the second Respondent was taken. At that stage a court question was asked by the learned Trial Judge to the P.W.1 which was answered by the P.W.1. Shri Ghorpade as follows:

"Court Question :- Where the detailed panchnama was scribed after noting the mainpoint?

Ans:- The panchnama was written at the house of accd. No.1 as per the main points written.

We did not preserve the paper on which main points were noted. Panchnama is official document and we did not feel it necessary to preserve the paper on which the main points are noted as it was not statutory requirement."

Thus, according to the said witness he wrote panchnama on the basis of main points which were noted on a piece

of paper. However, he did not preserve the piece of paper as he felt that it was not necessary to preserve the same. This aspect becomes very crucial when both the panch witnesses have not supported the prosecution. All this has come from the alleged author of the panchnama. In the cross-examination P.W.1 stated that he did not remember with which Inspector the goods seized from the possession of accused No.2 were given. So far as proof of contents of panchnama is concerned, the destruction of note made by the P.W.1 assumes importance when the attesting witnesses have failed to support the prosecution.

25. There is some material on record to show that the premises occupied by the first Respondent were in the name of one Shri Baldota. It is surprising that summons under section 108 of the Customs Act was not issued to Shri Baldota and he has not been examined. As pointed out earlier, the main statements under section 108 of the first Respondent and second Respondent which are relied upon by the prosecution have been allegedly recorded without issuing summons as required by sub-section 1 of section 108 of the Customs Act.

26. Apart from panchnama it will be necessary to see the evidence of P.W.1 on the recovery of 10 gold

biscuits from the premises of the first Respondent. In examination-in-chief, P.W.1 has stated that during the search he noticed a red colour cloth bag which was lying in a small passage near bathroom alongwith unused articles. He stated that "..... we found red colour cloth bag. In that bag there were ten biscuits of gold...." In the cross-examination he stated that Inspector Ayyer first showed the gold biscuits in the bag and thereafter he brought the same to him. He stated that when the Inspector Ayyer showed him the gold biscuits he was standing in the terrace. P.W.1 Shri Ghorpade corrected the said statement by stating that when Inspector Ayyer found the gold biscuits, he was standing in terrace and on being called he went to Inspector Ayyer. Thus, the statement made by him in examination-in-chief which indicates that all of them found the gold biscuits does not appear to be correct. At this stage, it will be necessary to refer to the evidence of Inspector Ayyer. On the evidence of Inspector Ayyer, there is a finding by the Trial Court that his evidence has been completely shattered in the cross-examination. The evidence of Inspector Ayyer (P.W.16) at Exhibit 141. He stated that on entering the house Shri Tathavade asked him to search the area near the bathroom in the house of the first Respondent. He described that there was one cloth bag of red colour in which he found some old newspapers. When he probed

deep into the bag, he found a paper packet which was unusually heavy. According to him he showed the paper packet to Shri Tathavade. Therefore, he called P.W.1 Shri Ghorpade and then the parcel was opened. He has been cross-examined on the said aspect at length. He stated that in the premises of the first Respondent there were 7 to 8 persons from department and two panch witnesses were present. He stated that after recovery of the gold biscuits the same was handed over to P.W.1 Ghorpade and when panchnama was being written, the property was in custody of P.W.1. The learned Trial Judge has rightly observed that evidence of P.W.1 and P.W.16 Shri Ayyer has raised the serious doubts about genuineness of the recovery of gold biscuits.

27. So far as the statement of the Respondent No.3 under section 108 of the Customs Act is concerned, the finding of the learned Judge is that the statement is recorded in language which was not known to him and which was not understood by him. The learned Judge has noted that by letter Exhibit 108 dated 26th August, 1986, the Respondent No.3 retracted his alleged statement. The learned Judge has referred to the admission of Superintendent Shri Tathavade that Excise Inspectors brought the Respondent No.3 in their vehicle from Bombay to Pune. The learned Judge has rightly observed that when summons was issued under sub-section

1 of section 108 of the Customs Act to the Respondent No.3, there was no reason for the Officers to bring him from Bombay to Pune in their vehicle.

28. It will be necessary to consider the question regarding scope of an Appeal against the acquittal. The Apex Court in the case of **Allarkha K. Mansuri Vs. State of Gujarat ((2002) 3 Supreme Court Cases 57)** has dealt with this aspect. The Apex Court in paragraph 6 held that:

"6. The settled position of law regarding the powers to be exercised by the High Court in an appeal against the order of acquittal is that though the High Court has full powers to review the evidence upon which an order of acquittal is based, it will not interfere with an order of acquittal because with the passing of an order of acquittal the presumption of innocence in favour of the accused is reinforced. The High Court should be slow in disturbing the finding of the fact arrived at by the trial court. The golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to

the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. In our country it is not a jurisdictional limitation on the appeal court but a Judge-made guideline of circumspection".

The perusal of the judgment of the Trial Court in the light of the evidence which is on record shows that the view which is taken by the learned Trial Judge is a possible view which can be taken on the basis of evidence available on record. It must be noted here that the Appeal against acquittal is in respect of the incident of the year 1986. The Appeal has remained pending in this court since the year 1989.

29. Taking overall view of the matter, this is not a case where interference can be made with the impugned Order of acquittal passed by the Trial Court. Hence, the Appeal is dismissed.

JUDGE